APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

SEPTEMBER TERM, 1959—JANUARY SESSION, 1960.

Nos. 12492 and 12753
KARL ZYSSET and NEW-NEL KITCHEN PRODUCTS COMPANY,
Plaintiffs-Appellees,
v.
POPEIL BROTHERS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 11, 1960.

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and MERCER, *District Judge*.

CASTLE, *Circuit Judge*. Karl Zysset, patentee, and New-Nel Kitchen Products Company, his licensee, plaintiffs-appellees, sued Popeil Brothers, Inc., defendant-appellant, for patent infringement and unfair competition. Trial of the issues involving validity of the patent and its infringement resulted in a judgment for plaintiffs in the District Court finding the Zysset patent valid and infringed and enjoining defendant from making, using or selling the accused devices or any other embodying the invention of claims 1 or 2 of Zysset patent 2,782,826. The issues involving unfair competition and plaintiffs' damages resulting from infringement remained to be tried.

Defendant appealed and contends that the District Court erred in holding the Zysset patent met the standards required for patentable invention over the non-cited prior art and, in any event, Zysset's claims are narrowly limited and not infringed by defendant's devices. Subsequent to defendant's appeal we remanded to the District Court to consider new evidence, the District Court having certified that there appeared to be sufficient cause at law to warrant reopening of the District Court's judgment order pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. After hearing on remand the District Court found that no new evidence was presented which required change of the Court's original conclusions of law and judgment. Defendant's motion for relief from the original judgment was denied and defendant's second appeal followed.

The contested issues are (1) the validity of Zysset's patent 2,782,826 and (2) whether defendant's accused devices are infringements.

In the Zysset patent, applied for March 11, 1954 and issued February 26, 1957, there is illustrated and described a vegetable shredder or chopper comprising a two-part, bell-like housing having an upper portion and a lower portion adapted to be placed over the goods to be shredded and a sinuous single-piece knife blade mounted at the lower end of an actuating spring-loaded shaft which is manually depressible to place the several cutting portions of the knife blade into chopping relation with the goods to be shredded. Adjacent the lower end portion of the stem is located a checking member attached to the stem and carrying a sleeve having two diametrical cams on the outer face thereof, a helical torsion spring disposed in the sleeve and coiled about the stem, one end of the spring being anchored. Inside the top bell-like portion, there is located a socket having a plurality of internal helical grooves. When the stem is depressed, the spring

clutch is disengaged and the knife blade does not rotate in its downward movement. However, on its upward movement near the end thereof, the cams on the checking member enter the helical grooves and the stem at that time being engaged by the spring clutch, the stem and the sinuous blade mounted thereon move into new position, different from the position of the blade as made on the previous chopping stroke. Within the housing is located a wiper cup or plate having a sinuous opening which conforms to the shape of the blade and vegetable portions which may adhere to the blade and are cleared therefrom on the upward stroke during which the wiper plate wipes such vegetable fragments from the blade.

The claims of the patent are:

1. In a vegetable shredder comprising a two-part bell-like housing having an upper and a lower portion and adapted to be put over the goods to be shredded, and a knife blade manually depressible by a spring-loaded actuating stem which has a lower end portion, said blade being mounted on the latter and on each actuation being angularly movable by an automatically-operating indexing device, the improved indexing device including a socket in the upper housing portion, said socket having a plurality of internal helical grooves, and a checking member rotatably but axially immovably mounted on the lower end-portion of the stem, said checking member comprising a ring seated on said stem portion, a sleeve mounted on said ring and having two diametrical cams engageable in said grooves, and a helical torsion spring disposed in said sleeve and coiled about said stem portion, one end of the spring being anchored in the sleeve and the other bearing on said ring; the whole in such combination that on depressing the stem the checking member in the first stage is rotated in one direction relatively to the stem and the spring is disengaged from the latter, while the stem and knife blade are not rotated, and that in the last stage of the stem's upward movement the spring engages the

stem and the latter together with the checking member and knife blade are rotated in the other direction.

2. A vegetable shredder is set out in claim 1, in which the knife blade is sinuous, a wiper cup is rotatably but axially immovably mounted in the lower portion of the housing for clearing the blade on the upward stroke thereof, said blade passing through a continuous slot in the bottom of the wiper cup, and a blade-carrying rod passing in tight fit through a plurality of openings in the blade and being secured to the lower end portion of the stem.

The feature contended by plaintiffs to be novel and to constitute patentable invention is the combination of the elements of (1) the repositioning of the chopper blade by automatic rotation occurring only in the last stage of the upward stroke when the blade is withdrawn from and in a position not to move or disturb the goods being shredded or chopped and (2) the utilization of a sinuous blade which although having the advantage of multiple blades eliminates the wedging of particles of the goods between blade sections; the sinuous blade wiping clean on each upward stroke by a continuous sinuous slot in a wiper plate or cup which rotates with the sinuous chopper blade.

The prior art cited to the Patent Office consisted of Hanel 2,140,010 and Suter, Swiss patent 155,720.

Hanel (1938) discloses a housing to be placed over the material to be chopped, a blade, and a stem having a spiral slot cooperating with a sleeve having ears protruding into the spiral slot for giving a rotary motion to the blade. It does not have a sinuous blade, nor a wiper cup, nor are means provided for permitting the blade to travel upwardly in a straight line and away from the chopped material before the rotary motion is imparted.

Suter (1932) shows merely a blade attached to a stem and handle so that they may be manually worked up and

down in an open hollow cylinder having a working base loosely inserted at the bottom. Three blades arranged in the shape of an "X" or a zigzag blade were disclosed. Suter does not disclose a sinuous blade, nor wiper cup, nor any automatic indexing feature.

Prior art not cited to the Patent Office but relied upon by defendant includes Blake 95,309, Hard 137,074 and Clark 2,422,340.

Blake (1869), a meat chopper, disclosed a partial rotation or indexing of the rod and knife blade which does not take place until it is lifted nearly out of the receptable so that the contents being chopped will not be disturbed by the partial revolution. Hard (1873), another meat chopper, disclosed the same feature. Clark (1947), a food chopper, disclosed a rotation and indexing feature which could by adjustment of the position of a ratchet disc on the rod or stem holding the blade be made to index only on the last stage of the upward stroke.

A 1952 Zeller patent 2,623,563 is illustrative of plaintiffs' exhibit 17, a Zello onion chopper, and similar to plaintiffs' exhibit 16, the Provit device. In these there was a housing and multiple blades which were operated by a stem and knob to chop food. There was no rotation or indexing of the blades although they were wiped by withdrawal into a slotted cup which sheathed them. The blades were not sinuous. Particular wedging between the blades could cause them to stick.

The District Court found that none of the prior art references discloses in combination the structure of the patent in suit; that it does not appear from any evidence that any of the disclosures would have suggested Zysset's shredder or chopper to a person skilled in the art, and concluded that the structure as shown and defined in the patent in suit constitutes a patentable invention. We agree with the District Court. It applied the correct criteria of

invention. The sinuosity of the blade and slot in the wiper cup or plate was wholly novel in concept and an important element in the combination claimed in the patent. It eliminated the problem of particles wedging between multiple blades without loss of the advantage of the additional chopping surfaces, and in combination with the indexing feature produced a result beyond that of mere mechanical improvement over existing art. A novel idea was incorporated. While it took mechanical skill to adapt the idea to practical use, and although the mechanics employed may have been obvious, the idea was not. It possessed the "impalpable something which distinguishes invention from simple mechanical skill". *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147. Here the sinuous blade constituted invention although found in a combination of other elements which were old in the art.

The evidence on the issue of infringement shows that the defendant manufactured and sold two accused devices. The first form of accused device was copied directly from plaintiff Zysset's shredder with only such slight variations as would effect economy in large scale manufacture. Instead of a plurality of holes in the sinuous blade, which defendant used without other change, it attached the blade to the blade carrying rod by the use of slots rather than to project the rod through holes. A "ring" and "sleeve" described in the claims of the patent in suit were made as one part rather than two. No change in functioning or manner of operation resulted.

Infringement is not avoided by making into one part that which has been shown as two where there is no change in the function or manner of operation of the element.

In this connection it was pointed out in *Specialty Equipment & Machinery Corp. v. Zell Motor Car Co.*, 4 Cir., 193 F. 2d 515, 518:

"While it is true that the function of a machine is not patentable and that there is infringement only where the same result is reached by substantially the same or similar means, *Westinghouse* v. *Boydon Power Brake Co.*, 170 U. S. 537, 569, 18 S. Ct. 707, 42 L. Ed. 1136, it is also true that one using the substance and essentials of a patented combination does not avoid infringement by varying non-essential details. Neither the joinder of different elements of a patented combination into one, nor the separation of one integral part into two or more doing together substantially what was done by the single element will evade a charge of infringement."

The rule was expressed by this court in *Apex Electrical Mfg. Co.* v. *Maytag Co.*, 7 Cir., 22 F. 2d 182, 187 as follows:

"Patents are not limited to the structure described and shown, but the invention may be embodied in various forms. A transposition or rearrangement of the parts as set forth in a patent is an embodiment of the patented invention and does not avoid infringement unless form, location or sequence is essential to the result or to the novelty of the claims." (Citing authorities.) "Infringement is not avoided by combining two elements of a claim in one part."

In *Royal Typewriter Co.* v. *Remington Rand, Inc.*, 2 Cir., 168 F. 2d 691, 693 the court had occasion to observe:

"* * * courts have with curious unanimity held that it does not avoid infringement to combine into one member that which the patent discloses as two, if the single member performs the duties of both in the same way. The decisions are so numerous that we confine ourselves to citing those which over the past thirty years we have passed ourselves."

The District Court did not err in its conclusion that the first form of defendant's accused device constituted infringement.

The second form of accused structure merely substituted a nylon ratchet clutch for the helical torsion spring clutch described in the Zysset patent. Other features, including the sinuous blade and wiper plate, are those of plaintiffs' device. The clutch in each instance operates to prevent the stem and blade from rotating except in one direction. This permits rotation to reposition the blade only on the last portion of the upward stroke when the chopper blade is no longer in contact with the goods being shredded or chopped. The utilization of a nylon ratchet and multiple pawl type clutch was from the standpoint of function and manner of operation a mechanical equivalent of the Zysset helical torsion spring type clutch. The conclusion of the District Court that the doctrine of "equivalents" applied, and that defendant's second form of device constituted infringement, was correct. In *Kiekhaefer Corporation* v. *Acro Tool & Die Works*, 7 Cir., 250 F. 2d 562, 568 this court in applying the doctrine of equivalents stated:

> "As the Supreme Court said in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 607, 70 S. Ct. 854, 856, 94 L. Ed. 1097, '* * * to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. * * * One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book, or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement.' In this opinion the Court goes on to point out that the doctrine of equivalents evolved in response to this type of infringement and reiterates (339 U. S. at page 608, 70 S. Ct. at page 856) that 'if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape.'"

We agree with the District Court that the evidence presented on the hearing subsequent to our remand was not such as to require a change in the original conclusions of law and judgment. We have considered the contentions of the defendant relating to file wrapper estoppel, narrow limitations of Zysset's claims, and the various arguments advanced in support thereof. We find them without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1959—April Session, 1960.

Nos. 12492 and 12753
KARL ZYSSET and NEW-NEL KITCHEN PRODUCTS COMPANY,
Plaintiffs-Appellees,
vs.
POPEIL BROTHERS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

UPON PETITION FOR REHEARING.

April 14, 1960.

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and MERCER, *District Judge*.

CASTLE, *Circuit Judge*. Popeil Brothers, Inc., defendant-appellant, petitions for a rehearing which *inter alia* requests modification so as to order that the District Court be reversed as to its finding and judgment that claim 1 of Zysset's patent 2,782,826 is valid and infringed.

A rehearing is denied. The opinion and order of this Court is modified to show that the judgment of the District Court is reversed as to claim 1 and affirmed as to claim 2 of Zysset patent 2,782,826 and affirmed in all other respects.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

KARL ZYSSET and NEW-NEL KITCHEN PRODUCTS COMPANY, *Plaintiffs,* *vs.* POPEIL BROTHERS, INC., *Defendant.*	Civil Action No. 57-C-763.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This action came before the Court on the Amended Complaint of the plaintiffs against defendant, charging infringement by defendant of United States Letters Patent No. 2,782,826 issued to Karl Zysset, on February 26, 1957. Defendant filed a Counterclaim praying for a declaratory judgment finding the patent in suit to be invalid or not infringed by defendant. The structure charged to infringe both claims of the patent in suit by the Complaint is a food shredder identified herein as Plaintiff's Exhibit 12. Defendant subsequently amended its Counterclaim to ask for a declaratory judgment that a second form of food shredder made by it subsequent to the commencement of this action and identified as Plaintiffs' Exhibits 27 and 28 does not infringe the patent in suit.

Upon full consideration of the record herein, including the testimony of witnesses in open court and the exhibits offered and received in evidence, the Court finds as follows:

Findings of Fact.

1. This action was filed on or about April 29, 1957, charging infringement of United States Letters Patent No. 2,782,826 by food shredders or choppers manufactured and sold by defendant since the issuance of said patent on February 26, 1957, the particular product being charged to infringe all of the claims of said patent being identified herein as Plaintiffs' Exhibit 12.

2. The patent in suit was issued to plaintiff, Karl Zysset, of Lyss, Switzerland, and there is no evidence that the patent has ever been assigned by said plaintiff to any other party. On April 2, 1957, Karl Zysset granted to Arthur O. Nelson and Harold Newman an exclusive license under the patent in suit to make, use and sell the patented invention and that exclusive license agreement was transferred, in writing, on July 10, 1957 to New-Nel Kitchen Products Company, of Chicago, an Illinois corporation, party plaintiff herein, as shown in Plaintiffs' Exhibit 5, and the plaintiffs, together, own all of the rights under said patent in suit.

3. Defendant, Popeil Brothers, Inc., is an Illinois corporation and has its principal place of business at Chicago, Illinois.

4. The parties, by their counsel, stipulated that the defendant, prior to the filing of this action, made and sold vegetable shredders or choppers of the type identified herein as Plaintiffs' Exhibit 12 and that evidence showed that defendant made and sold such devices subsequent to issuance of the patent in suit and continued to make and sell such devices after the filing of this action.

5. Before the patent in suit had been granted and issued by the United States Patent Office and while the application therefor was pending in the United States Patent Office, the defendant purchased in Chicago a vegetable shred-

der or chopper made in Switzerland under the authority of plaintiff, Karl Zysset, and such device was taken to the office of the defendant company, taken apart and carefully examined by defendant as to the form of its manufacture and method of operation. Said device so purchased by the defendant and marked Plaintiffs' Exhibit 6 was used by defendant as the model from which it made production drawings, molds, dies and tools for the subsequent manufacture by defendant of the structures charged to infringe the patent in suit. Only slight changes were made from the commercial structure purchased by defendant to produce the article charged to infringe, such changes as there were primarily being the omission of threads between various elements and the location of the attachments of the blade to the blade-holding bar, both of which were said to have reduced the cost of manufacture but neither of which changed the mode of operation or the results obtained thereby in the commercial structure made in Switzerland and purchased by the defendant in the United States, as exemplified in the device marked Plaintiffs' Exhibit 6.

6. In the patent in suit, there is illustrated and described a vegetable shredder or chopper comprising a two-part, bell-like housing having an upper portion and a lower portion adapted to be placed over the goods to be shredded and a sinuous single-piece knife blade mounted at the lower end of an actuating spring-loaded shaft which is manually depressible to place the several cutting portions of the knife blade into chopping relation with the goods to be shredded. Adjacent the lower end portion of the stem is located a checking member attached to the stem and carrying a sleeve having two diametrical cams on the outer face thereof, a helical torsion spring disposed in the sleeve and coiled about the stem, one end of the spring being anchored. Inside the top bell-like portion, there is located a socket having a plurality of internal helical grooves. When the stem is depressed, the spring clutch

is disengaged and the knife blade does not rotate in its downward movement. However, on its upward movement near the end thereof, the cams on the checking member enter the helical grooves and the stem at that time being engaged by the spring clutch, the stem and the sinuous blade mounted thereon move into new position, different from the position of the blade as made on the previous chopping stroke. Within the housing is located a wiper plate having a sinuous opening which substantially matches the shape of the blade and vegetable portions which may adhere to the blade are cleared therefrom on the upward stroke wherein the wiper plate wipes such vegetable fragments from the blade. As described in the patent, the checking member comprises a ring seated on the stem portion and a depending sleeve mounted on the ring. However, both in the Zysset commercial form of this device and in the structures charged to infringe, the ring and the sleeve are combined into an integral unit.

7. While in the commercial devices the ring and the sleeve above-mentioned are combined into an intergral unit, they perform precisely the same function operating in precisely the same manner as the ring and sleeve separately function and perform as disclosed in the patent for the same purpose and achieving the same result. It is not a departure from the disclosure of the patent for the ring and sleeve to be made in an integral unit instead of in two separate units.

8. The patent in suit is not limited as to the means of mounting the blade on the actuating stem.

9. The claims of the patent in suit contain no limitations as to whether the portions of the bell-like housing are joined frictionally or by threader engagement nor is there any limitation in either of the claims of the patent in suit as to the manner of mounting the handle knob at the upper end of the stem.

10. After this action had been filed and was at issue, the defendant commenced the manufacture and sale of a second form of vegetable shredder or chopper as to which it sought the declaratory judgment of this Court that such device identified herein as Plaintiffs' Exhibits 27 and 28 was not an infringement of the patent in suit. This device from the first form charged to infringe, Plaintiffs' Exhibit 12, primarily in the construction of the checking member which, in the first form charged to infringe, included a spring clutch which in the second form was changed to a plastic ratchet form of clutch having flexible blades which permitted rotation of the checking member relative to the stem in one direction but prevented such relative rotation in the opposite direction. While different in specific form, the ratchet-type clutch was designed and intended and actually operates to perform the same function as the spring clutch used in the first form of defendant's device charged to infringe and performs such function in substantially the same manner, to achieve the same result; that is, to permit partial rotation of the blade at the time the cams on the sleeve enter the helical grooves and to prevent rotation of the blade when the stem is depressed. Like the spring clutch, the ratchet clutch is a well-known simple form of one-way clutching, well-known in the art as equivalents for the purpose of preventing rotation of an element in one direction and permitting its free rotation in the opposite direction.

11. Karl Zysset, plaintiff, is engaged in the manufacture in Switzerland and the sale of vegetable shredders under the name of Blitzhacker, made in accordance with the patent in suit and as exemplified in the device marked Plaintiffs' Exhibit 6, illustrated and described in the Blitzhacker circulars, Plaintiffs' Exhibits 8e, 8e, 8f, 8g and 8h. Such devices made in Switzerland were first sold in this country in July, 1954. The other plaintiffs, New-Nel Kitchen Products Company, exclusive licensee in this

country under the patent in suit, commenced the manufacture and sale of vegetable shredders made in accordance with the patent in suit in the summer or fall of 1957. Its devices are exemplified in Plaintiffs' Exhibits 9, 24 and 30 and are illustrated in the drawing marked Plaintiffs' Exhibit 32 and Plaintiffs' Exhibit 37, and in the circulars marked Plaintiffs' Exhibits 11a, 11b, 11c and 11d.

12. The defendant's vegetable shredders or choppers in both forms presented to the Court are sold under various names, including Chop-O-Matic, Roto Chop and Merry Go Round. The first form of defendant's device charged to infringe has been identified herein as Plaintiffs' Exhibit 12 and a cut-open sample thereof has been identified as Plaintiffs' Exhibit 34. These exhibits are illustrated in the drawing Plaintiffs' Exhibit 33. The second form of defendant's device brought into this action by defendant's amendment to its Counterclaim for declaratory relief is exemplified in Defendant's Exhibits 27 and 28, illustrated in the drawing Defendant's Exhibit 32.

13. Defendant published catalog sheets or circulars, three of which are identified herein as Plaintiffs' Exhibits 14, 15, and 15a, which illustrate products of the defendant. This advertising matter is laudatory of the devices, is equally applicable both in illustration and descriptive matter to all forms of vegetable shredders or choppers made and sold by defendant, and represents that such devices were originated by or invented by the defendant.

14. The plaintiffs objected to bringing into this action the defendant's so-called second form of vegetable shredder or chopper which was first made after the commencement of this suit on the ground that the Court did not have jurisdiction under Title 28, U. S. Code, Section 2201, contending that there had been no actual controversy between the parties relative to such device and that defendant was actually seeking an advisory opinion of the

Court. The Court, however, gave defendant leave to bring the said second form of device before the Court for adjudication.

15. The first form of vegetable shredder or chopper made and sold by defendant, Popeil Brothers, Inc., as exemplified in Plaintiffs' Exhibit 12 and Plaintiffs' Exhibit 34, and as illustrated in the drawing Plaintiffs' Exhibit 33, fully responds to and includes the combination of elements set forth in both claims 1 and 2 of United States Letters Patent No. 2,782,826 here in suit.

16. The so-called second form of vegetable shredder or chopper made and sold by defendant commencing subsequent to the institution of this action and exemplified in Defendant's Exhibits 27 and 28 and illustrated in Defendant's Exhibit 32 likewise responds fully to and includes the combination of elements set forth in claims 1 and 2 of said United States Letters Patent No. 2,782,826 here in suit, the ratchet form of the checking means in said second form being the full equivalent of the spring clutch described in the patent in suit and used by defendant in the first form of vegetable shredders or choppers charged to infringe.

17. The defendant has cited a substantial number of prior art patents and publications, Defendant's Exhibits 5a to 5k inclusive, including:

Blake	No.	95,309
Hard		137,074
Allen		267,127
Hansen		1,023,517
Hanel		2,140,010
Clark		2,422,340
Zeller		2,623,563
Zysset (Austrian)		180,369
Zysset (German)		235,749
Suter (Swiss)		155,720

and excerpts from the publication "Ingenious Mechanisms".

The Zysset patents referred to in the foregoing group were issued upon the applications of Karl Zysset and do not represent prior art as to the patent in suit.

18. The Hanel patent No. 2,140,010 and the Suter Swiss patent No. 155,720 were expressly considered by the United States Patent Office before grant of the patent in suit and none of the other references in the prior art cited by defendant can be considered as better or closer prior art than those expressly considered by the Patent Office.

19. None of the references cited by the defendant discloses in combination the structure of the patent in suit and it does not appear from any evidence that any of such disclosures would have suggested to a person skilled in the art the vegetable shredder or chopper invented by Karl Zysset at the time of his invention thereof.

20. One of the patents primarily relied upon by defendant is Hanel patent No. 2,140,010 which was expressly considered by the Patent Office before the patent in suit was allowed, and the Hanel patent does not disclose a structure which will operate to perform the functions desired and intended by the patent in suit. In the Hanel patent, the blade is not advanced in the manner disclosed by the Zysset patent in suit to cut up the food to be chopped in the manner disclosed by Zysset. At the trial, defendant produced Mr. Hanel as a witness, although no previous notice thereof was given to plaintiffs and although no knowledge or structure known to Mr. Hanel, other than that shown in his patent No. 2,140,010 was set up in the pleadings or in any notice as a matter of defense. The only address of Mr. Hanel as to which plaintiffs were given any information either in the pleadings or by notice was the address given in the Hanel patent as Jackson Heights, New York. However, Mr. Hanel testified at the trial that he had not lived in Jackson Heights for a considerable period and that he does re-

side at R. D. No. 1, Box 242, Iona Lake Road, Franklinville, New Jersey. Over the objections of plaintiffs that there was no basis in any pleading or notice for such testimony, Mr. Hanel testified that in about 1938 he made models of one or more onion choppers, one of which, Defendant's Exhibit 16, corresponded to Fig. 5 of his patent. He also testified that another model, Defendant's Exhibit 12, which he said he had made and which he produced at the trial could have been modified to perform one of the functions of the Zysset patent in suit, namely, rotation of the blade in the latter part of the upward stroke thereof. While plaintiffs' objections to the testimony of Mr. Hanel for lack of notice may have been proper, the Court finds that Hanel's testimony as to what he actually did, even if true, and even if properly corroborated, would not have amounted to the combination disclosed and claimed in the Zysset patent in suit. What Mr. Hanel may now believe that he could have done after he has knowledge of the Zysset patent and its structures is of no consequence.

21. None of the prior art patents or publications anticipates the claims of the patent in suit and it would not have been obvious to one skilled in the art, at the time that any of such prior art disclosures were made, to have made therefrom or in combination with the other prior arts patents the invention described, disclosed and defined in the patent in suit.

22. Each of the claims of the patent in suit clearly and definitely defines a combination of elements cooperating together to provide a novel food shredder or chopper possessing many advantages over any of the structures of the prior art.

23. The patent in suit is a clear, concise and exact description of the Zysset invention, in such terms as to enable one skilled in the art to make and use the same.

24. The invention defined by claims 1 and 2 of the patent in suit was not patented or described in any printed publication or patent in this country or any foreign country before the filing date of the patent in suit.

25. The Zysset German patent No. 935,749, Defendant's Exhibit 5i, was not patented in Germany in accordance with the meaning of the United States Statutes, until November 24, 1955, which is the "ausgegeben" or publication date of the German patent, and that is the effective date of said patent for the purposes of this suit rather than the filing date of the German application, namely, March 10, 1954, as claimed by defendant.

26. The record contains no evidence of prior invention, public use or sale of the invention described and claimed in the patent in suit prior to the filing date of the application therefor, which would render the patent invalid.

27. The file wrapper of the patent in suit shows that there was no acts, express or implied, taken by the applicant for the patent in suit which create any estoppel or restriction of the claims in suit in so far as their present interpretation is to be made. The claims of the patent in suit as first presented were rejected by the Patent Office because of formal matters only and no amendments or changes were made to avoid prior art which would so restrict either claim of the patent in suit as to avoid infringement by the defendant in its manufacture and sale of devices like Plaintiffs' Exhibit 12 and 34 and Defendant's Exhibits 27 and 28 illustrated in the drawings, Plaintiffs' Exhibit 33 and Defendant's Exhibit 32, respectively.

28. Defendant carried on some negotiations with the representatives of Karl Zysset, plaintiff, for the purchase of the latter's vegetable shredders or choppers or for a license under Zysset's patent right and therefore knew of the pendency of the application for the patent in

suit before it had actually sold vegetable shredders and choppers for which it used a Zysset chopper as a guide or model but such negotiations did not culminate in any agreement between the parties and the terms offered to Zysset by defendant were so low as to make it appear that the defendant never expected or intended that such negotiations would culminate in an actual agreement. With full knowledge of the pendency of Zysset's patent applications, the defendant informed the plaintiff Zysset that it intended to proceed with its manufacture and sale of the vegetable shredder and chopper charged to infringe whether or not it had a license from plaintiff and it proceeded to do so. The Court finds that the defendant deliberately copied the invention of the patent in suit without authority.

29. Plaintiff Karl Zysset granted an exclusive license, Plaintiff's Exhibit 4, under the patent in suit, to Arthur O. Nelson and Harold Newman who paid $21,000.00 royalties as down payment thereunder and committed themselves to additional royalties in the amounts set forth in said license. The license was obtained by Arthur O. Nelson and Harold Newman expressly for New-Nel Kitchen Products Company, which was subsequently formed as an Illinois corporation for the purpose of manufacturing and selling the patented invention and such exclusive license agreement was assigned to New-Nel Kitchen Products Company with the approval of Karl Zysset as shown in Plaintiffs' Exhibit 5.

30. The equities in this case are with the plaintiffs, Karl Zysset and New-Nel Kitchen Products Company.

31. The device of the patent in suit has had great commercial success and more than 2,000,000 of such devices have been sold by the defendant and by the plaintiff, New-Nel Kitchen Products Company, in the United States.

32. It was an unfair practice for the defendant to have used the commercial structures made by plaintiff, Karl Zysset, in Switzerland, as models for such devices to be made by defendant in the United States although it did not constitute an infringement of the patent in suit until that patent had actually issued. Continuance of such practices after the issuance of the patent in suit was an unfair and inequitable act by the defendant in aggravation of the infringement charged.

33. The fact that defendant obtained a patent on its particular form of attachment of the knife blade to the shaft does not avoid infringement of the patent in suit. The particular means of attachment used by defendant is within the scope of both claims of the patent in suit and furthermore constitutes no change in the manner of operation or in the results of operation of the relative structures, both that of plaintiff and its licensee and those of the defendant operating in substantially the same manner to achieve substantially the same result through use of substantially the same means.

34. In addition to its counterclaims for declaratory judgment as to validity and infringement of the patent in suit, defendant filed an "additional counterclaim" herein charging a conspiracy by plaintiff to engage in acts of unfair competition against defendant and to bring about a violation of an alleged contract between defendant and Arthur O. Nelson. No evidence was presented in support of said counterclaim and the same should be dismissed.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and of the subject-matter of this action.

2. Plaintiff Karl Zysset is and has been the owner of United States Letters Patent No. 2,782,826 since said patent was issued to him on February 26, 1957.

3. The plaintiff New-Nel Kitchen Products Company is the exclusive licensee under the patent in suit by virtue of an exclusive license agreement dated April 2, 1957, Plaintiffs' Exhibit 4, and the assignment thereof dated July 10, 1957, Plaintiffs' Exhibit 5.

4. United States Letters Patent No. 2,782,826 and both of the claims thereof are good and valid in law.

5. Both of the claims of the patent in suit No. 2,782,826 have been and are being infringed by the defendant in the manufacture and sale of devices of the kind exemplified in Plaintiffs' Exhibit 12 and Plaintiffs' Exhibit 34 and as illustrated in the drawing marked Plaintiffs' Exhibit 33 and as exemplified in the devices marked Defendant's Exhibits 27 and 28 and as illustrated in the drawing marked Defendant's Exhibit 32.

6. None of the prior art references discloses the combination of a housing having a socket provided with helical grooves cooperating with an indexing device for advancing a food chopper blade near the end of the upward stroke nor do they disclose a sinuous blade operating through a sinuous slot in a wiper plate. Such a structure as shown and defined in the patent in suit constitutes a patentable invention and the patent in suit was legally and lawfully issued by the United States Patent Office.

7. The Zysset patent discloses an operative structure and clearly describes the construction and operation thereof in such terms as to be clearly understood by those skilled in the art to which the patent appertains.

8. German patent No. 935,749, Defendant's Exhibit 51 does not constitute prior art against the patent in suit.

9. Plaintiffs are entitled to an injunction restraining the defendant against committing further acts of infringement of either of the claims of the Zysset patent in suit No. 2,782,826 in the manufacture or sale of vegetable shredders of the kind exemplified in Plaintiffs' Exhibits 12 and 34 and illustrated in the drawing, Plaintiffs' Exhibit 33 and as exemplified in Defendant's Exhibits 27 and 28 and illustrated in the drawing Defendant's Exhibit 32.

10. Plaintiffs are entitled to recover from defendant the damages or profits as provided in the patent statutes of the United States which have been occasioned by defendant's infringement of the Zysset patent No. 2,782,826 together with interest thereon and the costs of this suit.

11. Plaintiffs are entitled to an accounting by defendant to determine the damages which plaintiffs shall recover from defendant and the Court, upon appropriate application, will appoint a Master for the purposes of such an accounting. After such accounting has been had, the Court will determine whether in view of the wilful nature of defendant's infringement the amount of damages so found shall be increased as provided by statute and the Court shall at the same time determine which shall be allowed to plaintiffs for their costs and disbursements herein. When the amount of the judgment, including costs, shall have been finally determined, plaintiffs shall have judgment therefor and shall be entitled to execution thereon.

12. Defendant is not entitled to any relief under its counterclaims herein, and the same should be dismissed with prejudice and with costs to plaintiffs.

ENTER: Oct. 3, 1958.

J. S. PERRY,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

KARL ZYSSET and NEW-NEL KITCHEN PRODUCTS COMPANY, *Plaintiffs,*
vs.
POPEIL BROTHERS, INC., *Defendant.*
} Civil Action No. 57-C-763.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause having come on to be heard on defendant's Motion for Relief from Judgment and on defendant's Motion to Consider New Evidence brought into existence by the issuance of Popeil patent No. 2,872,859 on February 10, 1959, being subsequent to the entry of the Judgment herein appealed from, the Court, having before it evidence submitted by both sides, and being fully advised in the premises, finds as follows:

Findings of Fact.

1. The Popeil patent No. 2,872,958 which issued on February 10, 1959 was pending as an application during the original trial of this cause and the Court at that time considered fully the type of food chopper then manufactured and sold by the defendant, which had an overriding nylon ratchet form of clutch as exemplified in Exhibit 3 attached to defendant's Motion, which has now been received in evidence and identified as defendant's Exhibit 38. The printed patent does not in and of itself present any new evidence relative to the structures held by this Court to infringe the Zysset patent in suit and which have been adjudged to be infringements thereof.

2. The Popeil patent No. 2,872,958 is said by defendant to be exemplified insofar as the overrunning clutch member thereof is concerned by the physical exhibit, defendant's Exhibit 38, which structure was fully explained to the Court at the original trial of this cause and which was, in fact, exemplified in defendant's Exhibits 27 and 28 and illustrated in the chart, defendant's Exhibit 32, received in evidence at the original trial of this cause. Such exhibits were fully explained by the witnesses at the original trial of this cause and fully discussed by counsel in their briefs and argument.

3. Ratchet types of overrunning clutches such as shown in the "second" form of defendant's structure heretofore held to infringe herein and exemplified by defendant's Exhibits 27 and 28 and illustrated in defendant's Exhibit 32, are regarded in the mechanical art as substantial mechanical equivalents of the specific ratchet of the coiled spring type illustrated in the Zysset patent in suit and as exemplified in the first form of food chopper, plaintiffs' Exhibit 12, made by the defendant and hertofore held to infringe.

4. The "second" form of defendant's food choppers, such as illustrated in defendant's Exhibit 32, is provided with a nylon ratchet type of overrunning clutch having spring fins, and such structures were considered by the Court at the original trial of this cause and were and are regarded by the Court as being designed to operate and do in fact operate to perform the same functions and accomplish the same result as taught by the Zysset patent in suit, and they operate in substantially the same manner by increase of frictional resistance when the blade shaft is sought to be rotated in the reverse direction. Such nylon ratchet form of overrunning clutch is the full equivalent of the Zysset form of overrunning clutch and for the same purpose.

5. The Court has considered the testimony and the exhibits offered by the parties in connection with the Motions and finds no new evidence of a character such as to change the Court's original opinion after the original trial of this cause.

CONCLUSIONS OF LAW.

1. Popeil patent No. 2,872,958 does not represent new evidence which alters or changes the Court's Conclusions of Law and Judgment entered herein on October 3, 1958.

2. Defendant's Motion for Relief from Judgment and defendant's Motion to Consider New Evidence brought into being by the issuance of the Popeil patent No. 2,872,958 are denied for lack of merit.

3. Plaintiffs are entitled to recover from defendant their costs and reasonable compensation for their expenses incurred as a result of defendant's said motions, such amounts to be determined by the Court at final hearing, along with other questions of damages, profits, costs and recoveries.

J. S. PERRY,
United States District Judge.

July 8, 1959.